Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FRED D. BROUSSARD, PETITIONER

Vs.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INSTITUTIONS DIVISION,ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Fred D. Broussard

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Houston, Texas 77277

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QUESTIONS PRESENTED

1. Whether the district court erred in concluding that petitioner had not sufficiently substantiated claims of unconstitutional race-based employment practices or unlawful retaliation by TDCJ to survive motion for summary judgement?

2. Whether the district court egregiously abused its discretion in arbitrarily vacating a trial date by saliently ignoring indisputable documentation warranting jury trial.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgement is the subject of this petition is as follows:

Fred D. Broussard	Petitioner
Terry Foster	Respondent
Don Kasper	Respondent
Don Keil	Respondent
Brent Larson	Respondent
Thomas Medart	Respondent
Mark Pickett	Respondent
Billy Pierce	Respondent
John Starliper	Respondent
Texas Department of Criminal Justice	Respondent

TABLE OF CONTENTS

OPINIONS BELOW.....6

JURISDICTION.....7

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....8

STATEMENT OF THE CASE.....9

REASONS FOR GRANTING THE WRIT.....10

CONCLUSION.....12

INDEX TO APPENDICES

APPENDIX A Opinion of the United States Court of appeals, July 19, 2007

APPENDIX B Memorandum and Order granting summary judgement, May 30, 2006

APPENDIX C Memorandum and Order denying reconsideration motion, June 26, 2006

APPENDIX D Memorandum and Order reflecting April 24, 2006 trial date setting.

TABLE OF AUTHORITIES CITED

CASES PAGE NO.

Burlington Industries, Inc. v. Ellerth, 524 US 742 (1998)

Burlington N. & Santa Fe v. White,__U.S. _ (2006) 10

126 S.Ct. 2405 (No. 05-259, June 22, 2006) 11

STATUES AND RULES

Title VII, Section 1983 11

42 U.S.C.A., Section 2000e-3(a) 11

Fed. R. Civ. P. 38 11

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States court of appeals dated July 19, 2007 appears at Appendix A to the petition and is unpublished.

The memorandum and order granting summary judgement dated May 30, 2006 appears at Appendix B to the petition and is unpublished.

The memorandum and order denying petitioner's motion for reconsideration, dated June 26, 2007 appears at Appendix C to the petition and is unpublished.

The memorandum and order reflecting a trial date in this action was set for April 24, 2006 appears at Appendix D to this petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was July 19, 2007

No motion or petition for rehearing was timely filed in my case.

The Jurisdiction of this Court is respectfully invoked under Title 28 U.S.C. Section 1254 (1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const.Amend. I: "Congress make no law respecting an establishing of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, **and to petition the Government for a redress of grievances.**" (Emphasis added)

U.S. Const. Amend. XIV, Section 1: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; "**nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"** (emphasis added)

STATEMENT OF THE CASE

Petitioner Fred A. Broussard, a Black American citizen and Ordained Christian Minister of the Baptist Faith served in the capacity of a chaplaincy volunteer and the Central Unit of the Institutions Division, Texas Department of Criminal Justice (TDCJ), located near Houston, Texas, from 1985 until early 1997, when he was officially hired and worked as a salaried Chaplin until September of 2003, eventually being involuntarily transferred to the Michael Unit Of the TDCJ, some one-hundred and fifty (150) miles from his home and family in Houston, Texas, on the ostensible authority of a "reduction in force". On July 21, 2003, Petitioner filed a formal complaint of racial discrimination to the U.S. Equal Employment Opportunity Commission (EEOC),; several weeks after Petitioner had filed his formal EEOC complaint, Warden Foster at Central Unit, TDCJ, filed a retaliatory harassment disciplinary action against Petitioner and forwarded same to Warden Castro at the Michael Unit, TDCJ, which subsequently was dismissed outright after

investigation. After Petitioner's physician determined serious health problems were actuated by stress from ongoing harassment and the arduous commute, upon physicians advise, on December 31, 2003, Petitioner retired from his position with TDCJ, after which Petitioner filed a second EEOC charge of harassment and retaliation, all of which formed the foundation for the civil rights action filed in federal district court against eight White Defendant-Respondents individually and in their respective official capacities with TDCJ.

REASONS FOR GRANTING THE PETITION

The decision below found that the district court did not fall into error by granting the defendants summary judgement on Petitioners discrimination claim for reason that "The TDCJ put forth a legitimate nondiscriminatory reason for the transfer –that it was implemented according to seniority and that others who were not reassigned had more time with the state **(sic)** Broussard. Broussard has not put forth any evidence that TDCJ's reason was pretest or that if was true, race was a motivating factor." (Slip Opinion p.4)

This finding flies in the face of superabundant evidence Petitioner provided to the district court altogether supportive of the sixteen (16) highly specified instances of racism, discrimination through disparate impact in hiring practices, hostility, harassment and retaliatory actions set forth at pages 25-31 0f Petitioners Second Amended Complaint filed May 9. 2005, suffered by and visited upon the Black American

Petitioner at the hands of , and through machinations devised by the eight (8) named White Americans who were the designated Defendants (now, Respondents) in this action. The respective Justices of this Honorable Court are well aware that "racism" carries connotations of race-based bigotry, prejudiced, violence, oppression, stereotyping, and discrimination, and that the term "racial discrimination" according to the UN International Convention on the Elimination of All Forms of Racial Discrimination (March 7, 1966) means **ANY** distinction, exclusion, restriction or **PREFERENCE** based on race, colour, descent, or nature al of ethnic origin which has the purpose **OR EFFECT** of nullifying or impairing the recognition enjoyment or exercise, of an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life, (emphasis all mine), and viewing the foregoing as seen through the prism of facts and the realities of Petitioners day-today prison experiences,

as fully documented and presented to the Houston, Texas federal district court in Civil Action No. H-04-1059, it becomes obvious that Petitioner was subjected to "reassignment with significantly different responsibilities" **i.e.,** "tangible employment action", specifically identified in **Burlington Industries, Inc. v. Ellerth,** 524 U.S., at 761-762 (1998) as constituting a significant change in employment status.

Had the district judge in this case actually view **ALL** the evidence Petitioner duly submitted in the light most favorable to Petitioner, the nonmoving party, and drawn **all reasonable inference** in Petitioners favor, Petitioner would have had this case tried before a jury of his peers, as provided for in **Fed.R. Civ P. 38**, and requested in his **Jury Demand** of May 6 2005, found at page 36 of Petitioner's Second Amended Complaint filed May 9, 2005. The district court erred in concluding that Petitioner had not sufficiently substantiated his claim of unconstitutional race-based employment

practices and the unlawful retaliation recognized and delineated by this Courts interpretation of **Section 704(a)** of **Title VII's** anti-retaliation provision, **42 U.S.C. Section 2000e-3(a),** found in **Burlington N. & Santa Fe V. White,** ___U.S. ____, ____ (2006), 126 S.Ct 2405 (No. 05-259, June 22, 2006), at the hands of the Defendants-Respondents in this case.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully Submitted,

/s/
Fred D. Broussard pro se

Date: October 17, 2007

No._____

_____

In The

SUPREME COURT OF THE UNITED STATES

Fred D. Broussard, Petitioner

Vs.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE-

INSTITUTIONS DIVISION, ET AL,. RESPONDENTS

PROOF OF SERVICE

I Fred D. Broussard, do swear or declare that on this date October 17, 2007 as required by the Rules of this Honorable Court, I have served a true and correct copy of the enclosed PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, and on every person required to be served or those party's designated counsel, by depositing

an envelope containing the above documents in the

United States mail, properly addressed to designated counsel, with first class postage pre-paid, or by delivery to a third party commercial carrier for delivery within 3 calendar days, addressed as follows:

SUSAN WERNER, ESQ.

Assistant Attorney General

For The State Of Texas

Attorney For Defendants

State Bar No. 21190350

P.O. Box 12548, Capitol Station

Austin, Texas 78711

I declare under penalty of perjury that the foregoing is true and correct

Executed on October 17, 2007

Signed ___/s/_____

Fred D. Broussard, Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20663
Summary Calendar

FRED D. BROUSSARD Plaintiff-Appellant

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE; DON KEIL, Individually and his capacity as Director of Religious Programs; DON KASPAR , individually and in his capacity as director of Chaplaincy; BILLY PIERCE, Individually and in his capacity as Director of Chaplaincy; MARK PICKETT, Individually and in his capacity as Chaplaincy Regional Coordinator of Region III; THOMAS MEDHART, Warden , Individually and in his capacity as Warden of Central Unit TDCJ; TERRY FOSTER,

Individually and in his capacity as Warden of Central Unit, TDCJ BRENT LARSEN, Individually; JOHN STARLIPER, Individually and in his capacity as lieutenant in the TDCJ Security System.

Defendants-Appellants

Appeal from the United States District Court
For the Southern District of Texas, Houston
USDC No. 4:04-CV-1059

Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges, PER CURIAM:*

Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR R 47.5.4.

No. 06-20663

Plaintiff-appellant Fred D. Broussard appeals the district court's summary judgement against him in an employment discrimination case. For the reasons stated we AFFIRM.

I, Factual and Procedural Background

Beginning in 1997, plaintiff-appellant Fred D. Broussard, an African American, worked for the Texas Department of Criminal Justice (TDCJ) at the Central Unit for six years. Prior to that, Broussard served for fourteen years as a volunteer chaplain in that same unit.

In 2001, Brent Larsen, a Caucasian, began working as a chaplain at the Central Unit. Broussard and Larsen had a strained relationship and repeatedly reported each others behavior to their supervisors. The unit warden and

chaplaincy officials instructed both chaplains to learn to work with each other.

In 2003, the state legislature mandated that the TDCJ reduce its force. As a result, sixty chaplains lost their jobs. And approximately twenty, including Broussard, were reassigned. With two exceptions, the terminations and reassignments were implemented according to seniority. Chaplains on active military active status retained their assignments, and three chaplains were administratively assigned death-row ministry. All of the chaplains that fell into these two categories had more time with the State than Broussard. Further, the chaplains assigned to death row had more experience in that ministry. Larsen who had also more time with the State than Broussard, remained at the Central Unit. Ultimately Broussard was transferred to his seventh choice location, the Michael Unit His pay, duties, and benefits remained the same, but Broussard's new duty station was over 200

miles from his home.

After the transfers were announced, Broussard filed an EEOC charge alleging race discrimination. About a month later, as Broussard was transferring to his new unit, the warden of Central Unit prepared a disciplinary case against Broussard related to security violations the Central Unit. The disciplinary case transferred with Broussard to his new unit, and that warden dismissed it

Broussard resigned after the disciplinary case was dismissed. He then filed another charge with the EEOC alleging retaliation based on the dismissed disciplinary case.

Broussard brought an employment discrimination suit against the following defendants: TDCJ; Don Keil, individually and in his capacity as Director of Religious Programs; Don Kaspar, individually and in his capacity as Director of Chaplaincy, Billy Pierce; Billy Pierce, individually and in his capacity as Director of

Chaplaincy; Mark Pickett, individually and in his capacity as Chaplaincy Regional Coordinator of Region III; Thomas Medart, Warden, individually and in his capacity as Warden of Central Unit, TDCJ ; Terry Foster, individually and in his capacity as Warden of Central Unit, TDCJ; Brent Larsen; John Starliper, individually and in his official capacity as lieutenant in the TDCJ Security System (collectively, "defendants")

The district court granted defendants motion for summary judgement, dismissing all of Broussard's claims against TDCJ and the eight individuals. Broussard now appeals.

II. Discussion

We review a grant of summary judgement de novo, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. See *Crawford v. Formosa Plastics*

Corp., 234 F. 3d 899, 902 (5th Cir. 2000).

"summary judgement is proper when the evidence reflects no genuine issues of material fact and the non -movant is entitled to judgement as a matter of law." Id (citing FED. R. CIV. P 56(c)). "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party'" Id (quoting *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986)

1 Title VII Discrimination Claim

Title VII prohibits employers from discriminating against employees on the basis of race. 42 U.S.C. § 2000e-2(a). Title VII claims are subject to the burden-shifting framework established in McDonnell Douglas Corps v. Green, 411 U.S. 792 (1973). Under this analysis, the plaintiff bears the initial burden of establishing a prima facie case of retaliation. Id. At 802-04 Then the burden of production shifts to the

defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Id. Once the defendant puts forth a legitimate, nondiscriminatory reason, the burden shifts back to the plaintiff to produce evidence that the defendants articulated reason is merely a pretext for discrimination, id, or that if true, it is the only one reason for the defendants conduct and that race was a motivating factor in the adverse employment action. Rachid v. Jack In The Box, Inc., 376 F. 3d 305, 312 (5th Cir. 2004).

To establish a prima facie case of discrimination, Broussard must establish that he "(1) is a member of a protected class; (2) was qualified for [his] position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside his protected class," or, in the case of disparate treatment, that others similarly situated were treated more favorably. Okoye v. Univ. of

Tex. Houston Health Sci. Cent. 245 F. 3d 507, 512-13 (5th Cir. 2001)

The district court held that Broussard failed to establish a prima facie case because he did not present evidence that he suffered as adverse employment action. Broussard argued that his transfer pursuant to a reduction in force constituted an adverse employment action.

However, even assuming that Broussard established a prima facie case, the district court did not err in granting summary judgement. The TDCJ put forth a legitimate nondiscriminatory reason for the transfer-that it was implemented according to seniority and the others who were not reassigned had more time with the State than Broussard. Broussard has not put forth any evidence that TDCJ's reason was pretext or that if it was true, race was a motivating factor. Accordingly, the district court did not

err in granting the defendants summary judgement on Broussard's discrimination claim.

2. Retaliation Claim

Title VII also forbids an employer from discriminating against an employee "because [the employee] has opposed any practice made an unlawful employment practice [under Title VII]" 42 U.S.C. § 2000e- 3 (a). To establish a prima facie case of unlawful retaliation, Broussard must show (1) that he "engaged in an activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a casual link existed between the protected activity and the adverse employment action." *Grimes v. Tex. Dep't of Mental Health and Mental Retardation,* 102 F.3d 137, 140 (5th Cir. 1996) Under Title VII. , an employee engages in protected activity when he has "opposed any practice made an

unlawful employment practice" under Title VII or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding , or hearing" under Title VII. 42 U.S.C. § 2000e-3 (a). An adverse employment action is any action that would be materially adverse to a reasonable employee , in other words, so harmful so as to dissuade the employee from making a complaint of discrimination. *Burlington N. & Santa Fe v. White*, 126 S.Ct. 2405, 2409 (2006)

Broussard has failed to establish a prima facie case of retaliation. "In order to establish the causation prong of a retaliation claim, the employee should demonstrate that the employer knew about the employee's protected activity." *Manning v. Chevron Chem. Co., L.L.C.*, 332 F.3d 874, 883 (5th Cir.2003). Broussard did not demonstrate that the warden who filed the disciplinary case knew of the Broussard's EEOC charge **1**, which was related to the chaplaincy department. As a result,

Broussard failed to demonstrate a casual link between his protected activity-that Broussard violated security procedures. TDCJ also presented evidence that the warden who instigated the disciplinary charge did not know of the EEOC charge. Broussard failed to put forth evidence that his explanation was pretext. Accordingly, the district court did not err in granting summary judgement on Broussard's retaliation claim.

3 . Hostile Work Environment

To succeed on his hostile work environment claim, Broussard must demonstrate that his work environment "permeated with discriminatory, intimidation, ridicule, and insult." *Harris v. Forklift Sys, Inc*, 510 U.S. 17, 21 (1993). A prima facie case of racial harassment alleging hostile work environment normally consists of five elements: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome

harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term [,] condition [,] or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action". *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 353 (5th Cir. 2001) In determining whether the environment is hostile, the court considers all the circumstances such as the frequency of the conduct and whether it was physically threatening or humiliating. *Harris*, **510 U.S. at 23.**

Broussard claims that the TDCJ subjected him to a hostile work environment repeatedly failing to discipline Larsen or respond adequately to the three internal grievances that Broussard filed in late 2002 and early 2003. Broussard tries to frame a disparate treatment claim as a hostile environment claim. Broussard does not allege that he was subjected to any racial epithets, insults,

ridicule, or jokes, or that any of the harassment was racial in nature. Broussard's complaints, when taken as a whole, are not severe and pervasive enough to create an abusive working environment. Because Broussard has failed to establish a prima facie case of hostile work environment, the district court properly granted summary judgement.

4. Section 1983 Claims Against the Individual Defendants

The individual Defendants in this case have asserted the defense of qualified immunity to Broussard's § 1983 claim. Qualified immunity will shield government officials from liability for civil damages when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" *Kinney v. Weaver*, 367 F.3d 337, 349 (5th Cir. 2004). In determining the applicability of qualified immunity, we must first determine "whether the plaintiff

has asserted a violation of a constitutional right" under currently applicable constitutional standards. *Id.* at 350 (quoting *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

In his complaint, Broussard argues that the individual defendants have violated the due process and equal protection clauses of the Fourteenth Amendment . Broussard fails to explain how the defendants violated his civil rights to due process of the law or to equal protection of the laws. An employment contract may give rise to a property interest in continued employment, the deprivation of which could give rise to a due process claim. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-77 (1972); see also *Mallek v. City of San Benito*, 121 F.3d 993, 998 (5th Cir. 1997). But Broussard has not asserted that any employment contract existed. Because Broussard has not directed the court to a violation of a constitutional right, he cannot defeat defendant's assertion of qualified immunity to his § 1983

claim. *See Salas*, 980- F. 2d at 305. Accordingly, the district court properly granted defendants motion for summary judgement on the § 1983 claim.

III. Conclusion

For the foregoing reasons, the district court's judgement is **AFFIRMED**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FRED BROUSSARD,	§	
	§	
Plaintiff	§	
	§	
VS.	§	
	§	
TEXAS DEPARTMENT OF	§	**Civil Action No.**
OF CRIMINAL JUSTICE	§	**H-04-1059**
	§	
DON KEIL, Individually and	§	
In his Capacity as Director	§	
Of Religious Programs ,	§	
	§	
DON KASPAR, Individually	§	
and in his Capacity as	§	
Director of Chaplaincy,	§	
	§	
BILLY PIERCE, Individually	§	
And in his Capacity as	§	
Director of Chaplaincy,	§	
	§	
MARK PICKETT, Individually	§	
And in his Capacity as	§	
Chaplaincy Regional	§	
Coordinator of Region III,	§	
	§	
WARDEN THOMAS MEDART	§	
Individually and in his	§	
Capacity as Warden of	§	
Central Unit, TDCJ	§	
	§	

BRENT LARSEN in his	§
Individual Capacity	§
	§
And	§
	§
JOHN STARLIPER	§
Individually and in his	§
Capacity as Lieutenant in	§
The TDCJ Security System	§
	§
	§
Defendants	§

MEMORANDUM AND ORDER

In this employment discrimination suit, Plaintiff Fred D. Broussard claims that his employer, the Texas Department Of Criminal Justice ("TDCJ"), along with various individual TDCJ wardens, supervisors, and other employees, discriminated against Broussard on the basis of his race by harassing him, failing to respond to his complaints about coworkers, and finally transferring him from one TDCJ facility to another as part of a reduction in force ("RIF") caused by state budget cuts. All Defendants now move for summary judgement. After

reviewing the parties' filings and the applicable law, the Court finds that the Defendants motion, Docket No. 57 , should be and hereby is Granted for all Defendants on all of Broussard's claims.

1. BACKGROUND

Broussard, an African American male, began working as a volunteer TDCJ chaplain at the Central Unit in Sugar Land, Texas in 1985. In October 1996, he applied for, but was denied, a position as a paid chaplain. A few months later, however, in February 1997, the TDCJ did grant Broussard the paid position. At that time, Broussard was classified as Chaplain I; he subsequently completed additional training and was promoted to Chaplain II. In the latter capacity, he developed and maintained spiritual programs for the prisoners housed at the Central Unit.

In June 2001, the TDCJ transferred Brent Larsen to the Central Unit. At the time of his transfer, Larsen, a Caucasian

male, was classified as Chaplain I; in 2003, he was promoted to Chaplain II. According to Broussard, **1**, Larsen was disruptive from the very beginning of his tenure at the Central Unit, refusing to attend meetings, assist in administrative or planning tasks, or accept guidance from Broussard, the lead chaplain on the unit. On one occasion, Larsen allegedly shouted at Broussard and approached him in a threatening manner; after this incident, Larsen refused to speak to Broussard at all. Broussard also claims that Larsen was often absent for long periods during his scheduled shifts and was repeatedly found sleeping on the job. Broussard reported these problems to supervisors, including defendant Thomas Medart, who was Warden of the Central Unit at

1 For the purposes of Defendants' motion for summary judgement, the court construes all contested factual issues in the light most favorable to Broussard, the non-movant. *See, e.g, Minter v Great Am. Ins. Co. of New York*, 423 F.3d 460, 465 (5th Cir.2005).

Time of Larsen's transfer, and Defendant Mark Pickett, the Regional Chaplaincy Coordinator. As a result, prison authorities made several unsuccessful attempts to transfer Larsen to another TDCJ facility, and both Broussard and Larsen received counseling, during which Broussard was told that he must learn to work with Broussard.

Broussard also alleges that, the beginning at about the same time as Larsen's arrival, Broussard began to experience hostile treatment from some of the Central Unit security guards, led by Defendant Lieutenant John Starliper. According to Broussard, Starliper and his guards interrupted Broussard's religious programs to conduct head counts of the prisoners and perform other security and scheduling tasks, restricted the number and types of inmates who could work in the chapel. Broussard claims that he attempted to discuss these incidents with Starliper but that the problems persisted.

Broussard complained to management about the guards behavior, filing employee grievances in October 2002,

November 2002, and March 2003 against Starliper and several of his subordinates. The grievances did not mention racial discrimination; rather they alleged that Starliper had violated TDCJ policies and inmates ' rights and that Pickett had failed adequately to address these problems. The grievances were referred to dispute resolution, during which the parties reached agreements. Broussard alleges, however. That those agreements were promptly breached by Starliper, Pickett, and the TDCJ. Broussard claims that the harassment by security and conflicts with Larsen caused him anxiety, distraction, declining physical health, and exhaustion.

In September 2001 , TDCJ management conducted a performance audit that revealed Larsens shortcomings. According to Broussard, however, the TDCJ declined to take action against Larsen, instead recommending again that the two chaplains try to get along. In November 2002, Medhart left the Central Unit, and in February 2003, Defendant Terry Foster succeeded Medhart as Warden. In June 2003, the

TDCJ announced the RIF, which was the result of state budget cuts. Because the primary mandate of a prison is security, , and because TDCJ was already suffering from a shortage of security personnel, the TDCJ claims that it was forced to eliminate some chaplains positions and to consolidate others. All facilities with more than one chaplain were subject to the RIF. Of 170 chaplaincy employees system wide, 65 were terminated or transferred to non-chaplaincy programs in September 2003.

Broussard was not terminated or transferred to a non-chaplaincy program but was, instead, initially transferred to his 15th choice facility, which was a 600 mile round trip drive from his home. Broussard alleges that Defendants Don Keil, Director of Religious Programs, and Don Kaspar, Director of Chaplaincy, made the transfer decision. He also claims that, had Keil, Kaspar, Defendant Billy Pierce (Kaspar's successor as Director of Chaplaincy), Pickett or Medart appropriately responded to Broussard's repeated complaints regarding

Larsen's misconduct, Larsen would have been dismissed, thereby rendering the Central Unit a one-chaplain facility not subject to the RIF.

After Broussard complained about his transfer , he was offered, and accepted a position at the Michael Unit, a facility in the vicinity of his 7th choice. The Michael Unity was a 300 mile round trip drive from his home. Following the transfer, Foster forwarded three disciplinary charges against Broussard to the Warden of the Michael Unit. Those charges were eventually dismissed.

The RIF was conducted according to the length of service within the chaplaincy programs, so that those chaplains with shortest tenures at TDCJ, notwithstanding whether they were classified as Chaplains I or Chaplains II, were terminated or transferred. The TDCJ contends that this approach was preferable to one based upon classification, because the latter method would have resulted in the loss of some of the most experienced chaplains, who had not attained Chaplain II

status due to lack of training facilities in their geographic areas. The TDCJ also argues that the impact upon African-American chaplains, as a group, was not statistically significant, as compared to the effect upon Caucasian chaplains.

Broussard claims however that the RIF was racially discriminatory and, more specifically, that it targeted him for an arduous transfer while protecting his Caucasian co-chaplain. He contends that no Christian, African American chaplain affected by the RIF was assigned to one of the chaplain's top twelve choices, while, of the sixteen non-African American chaplains, eight were assigned to their first choices, five were granted their second, third, or fourth choice, and the remaining three were given their ninth, twelfth and thirteenth choices, respectively. Broussard also argues that Foster's action, following the RIF, in forwarding the disciplinary charges to the warden of Broussard's new facility constituted retaliation for Broussard's earlier

grievances.

Broussard filed discrimination and retaliation charges with the Equal Employment Opportunity Commission ("EEOC") on July 21, 2003 and received a right - to - sue letter on December 19,2003. He filed this suit on March 17, 2004, alleging that the TDCJ engaged in racial discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*, and that the individual Defendants infringed his Fifth and Fourteenth Amendment rights to due process and equal protection, in violation of 42 U.S.C. § 1983. All Defendants now move for summary judgement.

ANALYSIS

A. Summary judgement standard

A motion for summary judgement brought pursuant to Federal Rule of Civil Procedure 56 requires the court to determine whether the moving party is entitled to judgement

as a matter of law based on the evidence thus far presented. *See* FED. R. CIV. P. 56©. "Summary judgement is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law". *Key v. City of Rowlett,* 247 F3d 206, 210 (5th Cir.), *cert. denied,* 534 U.S. 892 (2001) (internal quotation marks and citation omitted). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could enter a verdict for the non-moving party." *Crawford v. Formosa Plastics Corp.,* 234 F.3d 899, 902 (5th Cir. 2000) Thisa court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Id.*

B. The TDCJ's Motion For Summary Judgement

The TDCJ [2] contends that Broussard has failed to establish a *prima facie* case of Title VII discrimination, retaliation, or hostile work environment, and that he cannot rebut the TDCJ's asserted legitimate, non-discriminatory reason for his transfer. The TDCJ also asserts that Broussard cannot assert any Title VII claim arising from an act or incident occurring more than 300 days before the filing of his EEOC charge – that is, before September 21, 2002. Broussard argues that genuine factual issues preclude summary judgement and that, under certain circumstances, the court can consider events occurring outside the 300-day period in evaluating a hostile work environment claim. The court evaluates each claim and argument in turn.

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[2]It is undisputed that Title VII cannot support a cause of action against individual Defendants.

1. The Discrimination Claim

"title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or natural origin". *Grimes v. Texas Dep't of Mental Health*, 102 F.3d 137, 140 (5th Cir. 1996) Title VII claims are subject to the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

> McDonnell Douglas instructs that the plaintiff must first establish a *prima facie* case of [retaliation]....Once the Plaintiff presents a *prima facie* case, the defendant must then articulate a legitimate, nondiscriminatory reason for the questioned employment action...If the defendant is able to do so, the burden shifts back to the plaintiff to produce evidence that the defendant's articulated reason is merely a pretext for discrimination.

Frank v. Xerox Co. , 347 F.3d 130, 137 (5th Cir. 2003). To establish a prima facie case of discrimination, a plaintiff must provide evidence that he "(1) is a member of a protected class; (2) was qualified for [his] position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, shows that others similarly were treated

more favorably". *Okoye v. Univ. of Texas Houston,* 245 F.3d 507, 512-13 (5th Cir. 2001) (internal quotation marks omitted)

For the purposes of Title VII, " (a) tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus v. Ellerth,* 524 U.S. 742, 761 (1998). "A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors." *Id.* at 762.

Broussard argues that the RIF transfer constituted a tangible employment action. A transfer can amount to a demotion or constructive discharge if it is "akin to acts such as hiring, granting leave, discharging, promoting, and compensating." *Burger v. Cent. Apartment Mgmt., Inc.,* 168

F.3d 875, 879 (5th Cir. 1999) (internal quotation marks omitted). Documented reprimands and transfer decisions unaccompanied by changes in salary, benefits, or job duties do not, however, qualify as tangible employment actions. *Felton v. Polles*, 315 F3d 470, 487 (5th Cir. 2002); *Burger*, 168 F3d at 879. As Judge Posner, writing for the Seventh Circuit Court of Appeals, has explained;

> Obviously a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trival.

Williams v. Bristol-Meyers Squibb Co., 85 F. 3d 270, 274 (7th Cir. 1996), quoted in *Burger, 168 F. 3d at 879.*

Broussard contends that the TDCJ, by assigning him to his fifteenth-choice location and then to a facility in the vicinity of his seventh- choice location, subjected him to a round-trip commute of hundreds of miles per day, effectively forcing him to resign. Under circumstances nearly identical to these,

however the 5th Circuit has found that a transfer did not constitute a constructive discharge. See *Hill v. K-Mart Corp.*, 699 F 2d 776, 779 (5th Cir. 1983) (affirming summary judgement for the defendant on the plaintiffs constructive discharge claim, which arose from her transfer from Pine Bluff, Arkansas to Jackson, Mississippi, a move of more than 200 miles). Broussard acknowledges that his transfer did not involve a reduction in pay or benefits or a significant change in job duties. In the absence of such circumstances, *Hill* requires the Court to find that the transfer did not constitute a constructive discharge.

Broussard also argues that the RIF violated Title VII because of its disparate impact on African Americans. To establish a *prima facie* disparate impact claim, the plaintiff must show "that the employer's facially neutral....standards [operate] in a significantly discriminatory pattern." *Banks v. East Baton Rouge Parrish Sch. Bd.*, 320 F 3d 570, 578 (5th Cir. 2003). The TDCJ points out that the RIF did not impact African American chaplains in any statistically significant

respect, as compared to Caucasian chaplains. Broussard, however, objects to the inclusion in such a calculation of two African American, Muslim chaplains, who were not transferred in the RIF to their senior status. According to Broussard, in the 1980's, when these two chaplains were hired, the only Muslims in the TDCJ system were Black Muslims. The TDCJ thus had no choice but to hire African Americans for the Muslim chaplain positions, and hence, Broussard argues, these chaplains were too senior in 2003 to be affected by the RIF.

While the Court concedes the possibility that the TDCJ's hiring practices in the 1980's may have been tainted by racism and that, as a result, the TDCJ may at that time have hired African Americans only when no other options were available, those alleged hiring practices are not the subject of this lawsuit. Nor is Broussard claiming that the TDCJ engaged in religious discrimination – that is, that the TDCJ structured the RIF in such a way as to disadvantage African Americans, and he has failed to refute the TDCJ's statistical

evidence disproving such a claim. Accordingly, the Court hereby **GRANTS** summary judgement for the TDCJ on Broussard's discrimination claim.

2. The Retaliation Claim

Title VII also makes it "an unlawful employment practice for an employer to discriminate against any of [it's] employees...because [the employee] has opposed any practice made unlawful employment practice by this subchapter...." 42 U.S.C. § 2000e-3(a). " A plaintiff establishes a *prima facie case* [of] unlawful retaliation by proving (1) that [he] engaged in an activity protected by title VII, (2) that an adverse employment action occurred, and (3) that a casual link existed between the protected activity and the adverse employment action." *Grimes*, 102 F.3d at 140. Here Broussard has not pled or provided any evidence that he engaged in activity protected by title VII prior to filing the EEOC charge that gave rise to this suit. Accordingly, he has

failed to establish a *prima facie* case of retaliation, and the Court hereby **GRANTS** summary judgement for the TDCJ on that claim.

3. The Hostile Work Environment Claim

Finally Broussard claims that the TDCJ subjected him to a hostile work environment by repeatedly failing to discipline Larsen or respond adequately to the three internal grievances that Broussard filed in late 2002 and early 2003. Under Title VII, a plaintiff claiming a hostile work environment must demonstrate that his workplace is "permeated with discriminatory intimidation, ridicule, and insult...that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems Inc.*.510 U.S. 17,21 (1993) (internal quotation marks and citation omitted)

> A *prima facie* case of racial harassment alleging hostile work environment normally consists of five elements: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

Celestine v. Petroleos de Venezuella SA, 266 F. 3d 343, 353 (5th Cir. 2001). Where a plaintiff alleges hostile work environment harassment by a supervisor, the fifth prong is automatically met. *Id. at 354.*

Title VII imposes a 300 day limitation period for filing charges of discrimination with the EEOC, 42 U.S.C § 2000e-5(e)(1), and the TDCJ contends that the provision precludes Broussard from asserting, as support for his hostile work environment claim, any even occurring before September 21, 2002. Broussard argues, however, that the 300-day limitation period does not apply to his claim, which alleges one continuous violation beginning with Defendants' very first discriminatory act and culminating in Broussard's transfer.

"The continuing violation theory relieves a plaintiff of

establishing that all of the complained-of conduct occurred within the actionable period if the plaintiff can show a series of related acts, one or more which falls within the limitations period". *Celestine v. Petroleos de Venezuella SA*, 266 F. 3d 343, 351 (5th Cir. 2001). "However the continuing violations doctrine does not automatically attach in hostile work environment cases, and the burden remains on the employee to demonstrate [that] an organized scheme led to and included the present violation." *Id.* at 352. In determining whether a continuing violation exists, the court asks three questions:

> (1) Do the alleged acts involve the same types of discrimination, tending to connect them in a continuing violation? (2) Are the alleged acts recurring or more in the nature of an isolated work assignment or incident? (3) Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her own rights?

Id. The continuing violation theory requires that the acts occurring within the limitations period be of the same sort as those that took place outside of the period and that the acts be similar to one another:

> Given [the] various restrictions on use of the continuing violation doctrine, the burden is upon [Plaintiff] to offer evidence that [he] suffered race-based harassment both prior to and during the filing period, that the incidents of harassment were related, and that the harassment was pursuant to an organized scheme.

Id. at 353. The Court looks to the totality of the circumstances, including "the frequency of the conduct, it's severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with [the] employee's work performance." *Id.* at 113.

Here, the Plaintiff complains that TDCJ management improperly resolved his grievances and countenanced repeated interruptions of his religious services by prison guards. He also alleges that Larsen's inadequate performance, hostility, and refusal to cooperate with Broussard contributed to the hostile work environment. Even were the court to find, however, that all of these events were related, such as those occurring outside of the 300 day period may properly be included under a continuing violation analysis, the TDCJ's alleged actions do not rise to the level

of a hostile work environment.

The essence of Broussard's claims appears to be that TDCJ discriminated against African Americans in general, via the RIF, and against Broussard in particular, by failing to discipline and/or discharge Larsen. As explained above, the TDCJ has produced statistical evidence to rebut the first allegation. And, as the Fifth Circuit stated in *Fentroy v. Dillard Texas Operating Ltd. P'ship*, 2001 WL 1485798 (5th Cir. Nov. 8, 2001), [3] the second contention may serve as the basis for a claim of disparate treatment but not out of a hostile work environment.

In *Fentroy* , the Plaintiff's summary judgement evidence established that her employer disciplined her more harshly than similarly situated Caucasian employees, demoted her

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[3]This unpublished decision is persuasive, but not binding, precedent. It is however, instructive as to the Fifth Circuit's approach to claims such as Broussard's.

upon her return from medical leave while permitted

Caucasians returning from such leaves to return to their previous positions, instructed subordinates not to hire African American workers, and paid Caucasians, more and promoted them more frequently than African Americans. *Id.* at *2-*3. The Fifth Circuit noted that facts such as these could establish a *prima facie* case of disparate treatment discrimination but could not support a hostile work environment claim, because "no evidence exist[ed] that [the plaintiff] was subjected to racially discriminatory intimidation, ridicule or insult" or that any racial epithets had been directed at he. *Id.* at *3

Similarly, in this case , Broussard argues that Larsen was give preferential treatment because he is Caucasian and that Broussard's complaints were not adequately addressed because he is African American. He also argues that, at about the same time as Larsen's arrival, the guards began more frequently to interrupt Broussard's religious services to perform security and administrative functions.› He does not

claim that any racial epithet or other explicitly racist behavior was directed at him or, with the possible-though remote-exception of Larsen's one alleged tantrum, that he was physically threatened in any way. In sum his real complaint is that he was subjected to poorer treatment and more harshly deal with then his Caucasian coworker. This is a quintessential disparate treatment claim.

A disparate treatment claim, however, is more colorable only if it is based upon a tangible employment action. *See Felton*, 315 F.3d at 486-87 (noting that, while this area of the law is still evolving, *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995) , which remains valid and binding precedent, applied the requirement to both retaliation and disparate treatment claims). Broussard's claim does not involve a tangible employment action, as the TDCJ acts complained or are not

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9 Broussard's contention that these interruptions were motivated by his race is oblique, at best. The thrust of his argument appears to be that Larsen's arrival catalyzed previously latent racism within the TDCJ. Even if Broussard is correct, however, the guards' alleged harassment simply was not severe enough or explicitly race-based enough to satisfy the requirements of a hostile work environment claim.

C. The Defendants Motion for Summary Judgement

Defendants Medart and Starliper argue that Broussard's claims against them fail for lack of subject matter jurisdiction. All individual Defendants[3] argue that Broussard cannot overcome their qualified immunity and, in any event, has not stated a claim of retaliation, disparate treatment, disparate impact, or hostile work environment against them under § 1983. The Court addresses each contention in turn.

1. Medart's Jurisdictional Challenge

The original Complaint in this case was filed on March 17, FED R. CIV. P. 4(m) provides that the court must dismiss an action without prejudiced as to any defendant who is not served with copies of the Summons and Complaint within 120 days of the filing of the Complaint. Medart

[3]Plantiff concedes that no § 1983 claim may be asserted against TDCJ.

contends that he was not timely served and, therefore, that Plaintiff's claims against him should be dismissed.

Broussard asserts that, that when he initially attempted to serve Medart via certified mail at the TDCJ, Medart had already ended his employment with the TDCJ and had left no forwarding address. Medart was finally served on August 6, 2004. Broussard complains that Medart should not be rewarded for resisting service and should not be permitted to object to personal jurisdiction after filing his Answer or other general appearance.

At the onset, the Court notes that Medart included his objection to personal jurisdiction in his Answer to Broussard's First Amended Complaint. The jurisdictional argument was not, however raised in Defendants' Rule 12 (c) joint motion for judgement on the pleadings, Docket No. 26, in which Medart joined. Rule 12(g) provides that "(a) party who makes a motion under [any section of rule 12] may join with it any other motions herein provided for and then

available to the party" FED. R. CIV. P. 12 (g). And Rule 12 (h)(!)(A). The jurisdictional defense was obviously available to Medart at the time of the rule 12(c) motion for judgement on the pleadings, as that motion was filed after Medart's Answer. Accordingly, Rule 12 (h)(1) mandates a finding of waiver, and Medart's motion for dismissal on jurisdictional grounds is therefore **DENIED.**

2. Starliper's Jurisdictional Challenge

Broussard's original Complaint did not assert claims against Starliper, who was added as a defendant in Broussard's first amended Complaint, Docket No. 21, which was filed on August 6, 2004. Starliper concedes that he was served with copies of the Summons and first amended Complaint in September 2004, well within the 120 day time limit established by FED. R. CIV. P 4(m). Accordingly, Starliper's motion to dismiss on jurisdictional grounds is **DENIED.**

Qualified Immunity

Qualified immunity is "*an immunity from suit* rather than a mere defense to liability....." *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (internal quotation marks omitted; emphasis in original). In undertaking the threshold inquiry whether the individual Defendants are entitled to qualified immunity, the court asks the following question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show [that] the [Defendants] conduct violated a constitutional right?" *Id.* at 201 In his Second Amended Complaint, Broussard avers generally that Defendants violated his constitutional rights by giving Larsen preferential treatment, harassing Broussard, transferring Broussard during the RIF, and lodging disciplinary complaints against him after the transfer.

A plaintiff may, of course, assert both Title VII and § 1983 claims in a single suit, if the facts alleged establishes

violations both of Title VII and one or more independent constitutional or statutory rights. *See Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989) ("Title VII is the exclusive remedy for a violation of its own terms. But when a public employer's conduct violates both Title VII and a separate constitutional or statutory right, the injured employee may pursue a remedy under § 1983 as well as under Title VII.") (emphasis omitted). For instance, an employee who was fired in retaliation for testifying at an Equal Employment Opportunity ("EEO") hearing may sue under both Title VII, on a claim of retaliation for protected conduct, and § 1983, on a claim of infringement of the independent First Amendment right to testify. *See Id.* at 1576.

Relying on the First Amendment cases like *Johnston*, the individual Defendants in this case argue that, because Broussard has not pled the violation of a First Amendment right, his § 1983 claim cannot survive beyond summary judgement. (*See* Defs. ' Mot. For Summ. J at 22.) The

Johnston holding is not, of course, so limited. Broussard may base his § 1983 claim on the alleged violation of *any* constitutional or statutory right (excepting only Title VII itself).

In Broussard's Second Amended Complaint, he invokes the due process and equal protection clauses of the Fourteenth Amendment. (*See* 2d Am. Compl. At 24.) He does not however, explain, in either the Complaint or his response to the motion for summary judgement, *how* Defendants' actions violated his right to due process of law or to the equal protection of the laws. Broussard has provided no citations to constitutional provisions, statues, or precedents that support his due process and equal protection claims

While it is true that an employment contract constitutes property, the deprivation of which may give rise to a due process claim. *See Malek v. City of San Benito*, 121 F 3d 993, 998 (5th Cir. 1997), Broussard has not pled or otherwise

asserted that any such contract existed. Even were the Court find that Broussard did posses a property interest in his continued employment, the fact remains that TDCJ did not terminate his employment; Broussard resigned, and the Court has found that the circumstances surrounding his resignation did not render it a constructive termination. Moreover, the Fourteenth Amendment does not give rise to a right not to be harassed while at work, or a right to competent and cooperative coworkers. Accordingly, because Broussard has not pled the violation of a legitimate , non Title VII constitutional or statutory right, he cannot defeat Defendants' assertion of qualified immunity. The Court therefore **GRANTS** summary judgement for the individual Defendants on Broussard's § 1983 claims against them.

III. CONCLUSION

Broussard has failed to establish a *prima facie* case of employment discrimination under Title VII, because he has

not demonstrated that he suffered a tangible employment action, that the TDCJ treated African Americans and Caucasians differently, or that the TDCJ's facially neutral actions had disparate impacts on African Americans and Caucasians. He has not shown that he engaged in protected activity, a necessary element of his Title VII claim, or that Defendants' actions were severe and frequent enough to constitute a hostile work environment. Finally, he has failed to plead facts demonstrating any violation of an independent constitutional or statutory right sufficient to support a § 1983 claim against the Defendants. Accordingly, all of Broussard's claims are hereby **DISMISSED WITH PREJUDICED**

IT IS SO ORDERED

SIGNED at Houston, Texas, on this 30th day of May, 2006

__/s/_____

KEITH P. ELLISON

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FRED D. BROUSSARD,	§	
	§	
Plaintiff	§	
	§	
VS	§	**CIVIL ACTION**
	§	**NO. H-04-1059**
TEXAS DEPARTMENT OF	§	
CRIMINAL JUSTICE,et al.,	§	
	§	
	§	
Defendants	§	

MEMORANDUM AND ORDER

Pending before the court in this employment discrimination case is Plaintiff Fred Broussard's motion, pursuant to FED. R. CIV. P. 59(e), for reconsideration of the Court's Memorandum and Order and Final Judgement dated May 20, 2006, which granted summary judgement for Defendants on all of Broussard's claims. After considering Broussard's motion and the applicable law, the Court finds that the motion, Docket No. 68, should be and hereby is

DENIED.

A motion for reconsideration may not be used to rehash rejected arguments or to introduce new ones that could have been offered earlier. *See, e.g.* , *LeClerc v. Webb*, 419 F.3d 405, 412 n.13 (5th Cir. 2005) Reconsideration is, rather, an unusual remedy that should be used sparingly. *Id.* Here, Broussard argues that (1) the Court improperly relied upon *Hill v. Kmart Corp.*, 699 F.2d 776 (5th Cir. 1983) in finding that Broussard was not constructively discharged, and (2) the Court erred in refusing to consider the past hiring practices of Defendant, Texas Department Of Criminal Justice ("TDCJ") or to adopt Broussard's rather than the TDCJ's statistical analysis of the reduction in force ("RIF") that gave rise to this suit. The Court evaluates each contention in turn [1]

[1] After the Court granted summary judgement for Defendants in this case, the United States Supreme Court issued its opinion in *Burlington N. & Santa Fe Ry. Co. v. White*, No. 05-259 (June 22, 2006), holding that Title VII retaliation claims are not subject to the stringent "ultimate employment action" standard applicable to discrimination claims. As this Court explained in it's May 30 Memorandum and Order, Broussard's retaliation claim failed because he did not assert a key element of the *Prima facie* case-

Namely, the requirement that a Plaintiff show that he engaged in activity protected by Title VII. Accordingly, the *Burlington Northern* case does not alter this Court's analysis or resolution of Broussard's retaliation claim, which the court therefore declines to reconsider.

1. THE HILL CASE

Broussard insists that racial discrimination is no longer so overt as it once was and, therefore that the Court must search for fine nuances and levels of meaning in facially neutral actions and circumstances. While Broussard's characterization or modern racism does, no doubt, accurately describe some cases, a Title VII Plaintiff must nonetheless – in every case – bear his burden of demonstrating both a tangible employment action and evidence of discriminatory motive. In *Hill,* the Fifth Circuit upheld the trial court's finding that the plaintiff had not borne that burden.

In it's May 30 Order, the Court found that the facts of this case are virtually identical to those of *Hill*. Broussard's motion for reconsideration sets forth fourteen supposed distinctions between *Hill* and the instant case, arguing that these differences require the Court to allow Broussard to submit his claims to a jury. The Court's evaluations of these attempted distinctions are as follows:

a. " Hill had a history – from shortly after August 1975 to Fall 1976 – of disagreements and co-worker problems over a period of time with several employees " (Pl.'s Mot. For Reconsideration at 3.)[2] As he himself argued in his Complaint, which was incorporated by reference in his response to Defendants' summary judgement motion, Broussard had a lengthy history of conflicts with his co-chaplain and a record of repeated clashes with prison guards. (See 2d Am. Compl. At 7¶ 21 -11 ¶33.)

[2] Each lettered section is quoted from Broussard's motion. The Court's response to each appears directly below the lettered excerpt.

" In each circumstance, the management representative [in *Hill*], McDaniel, made a credible effort to alleviate the problems – recommending the other employee's termination on at least two occasions"

In actuality, the Fifth Circuit stated in *Hill* that "the handling of the incidents of racial remarks left something to be desired" and that, in both incidents involving racial slurs. McDaniel had "based his disciplinary decision on grounds other than racism or in subordination and, in one of the instances, allowed the offending employee to remain employed after ordering her dismissed" 699 F.2d at 778. Similarly in this case, TDCJ supervisors made some attempts to have Larsen , the offending co-chaplain, transferred in response to Broussard's complaints, despite the lack of evidence that Larsen's behavior was motivated by racism.

"c On the third occasion of Hill's inability to get along, the other employee was perhaps equally ornery but seemed to have a "charmed existence". Unlike *Hill* (and unlike Larsen

in the instant case)[,] McDaniel considered this other employee (Brooks)' a valued employee, crediting the plant departments notable success to [his] experience and creativity'"[3]

In fact as the Hill opinion makes clear, Brook's existence was said to be "charmed" because he "was noted for his ongoing confrontations with assistant managers – black and white, male and female – and his persistent ability always to come out on top." *Id* In other words, Brooks was, in this crucial respect identical to Larsen.

"d. Nonetheless, to appease Hill yet another time, McDaniel took action to separate her from Brooks. Still, within six months, Hill had further complaints against Brooks that "he was watching her while she supervised a sidewalk sale." It turned out that Brook's had been temporarily pressed into surveillance and security duty by the

[3]First altercation added, second in original

management – he was simply doing his job (a statement which could seldom be made about Larsen in the instant case)."

In actual fact, as it is evident from Broussard's accurate description of these Hill allegations, McDaniel's efforts to separate Hill and Brooks were futile, as management continued to assign Brooks to work in areas where Hill was detailed. Moreover, McDaniel's way of separating the two employees was to transfer Hill ("the assistant manager," *id.*) – not Brooks – to another area.

"e. The actions and conduct of Brooks towards Hill were deemed by the court to be no evidence of actionable discrimination where Brooks 'apparently treated all assistant managers equally – with measured disdain[;]"

It is apparent from Broussard's Complaint that Larsen treated all TDCJ management and rules with equal contempt. See 2d Am. Compl. At 7¶ 21 – 11 ¶ 33.) Moreover, there is no

evidence that the interruptions of religious services by guards were targeted at Broussard alone. And as in *Hill*, the record does not "support a finding that these isolated incidents resulted in an atmosphere charged with racist overtones and racial tension." 699 F.2d at 778.

'f. Hill was transferred from Pine Bluff to Shreveport, and after 21 months at that station, from Shreveport to Mississippi."

The Court is unsure of the intended import of this information. Certainly the specific locations involved in the two cases are different. The Court notes, however, that Pine Bluff and Shreveport are 249.6 miles apart and, thus, that Hill's round-trip commute after the first transfer would have been more than 500 miles.

"g. It was the practice of Hill's employer to 'rotate' management personnel in and out of markets, Hill was obviously aware of this, and had managers (such as Hill) to

be routinely transferred after serving 18-24 months in a store."

While the TDCJ did not have a standard practice of rotating chaplains, it transferred Broussard as part of a system-wide reduction in force ("RIF") conducted according to neutral standards that actually preserved the jobs of more African American chaplains than Broussard's preferred approach would have. Moreover, there is no evidence to indicate that Broussard had a right to a position at a particular location, and the TDCJ certainly was not stopped from transferring him merely because it had not done so before.

"h. At the time of her rotation out of Shreveport and into Jackson, another employee (White male) with equal time at the Shreveport store was also rooted out"

Many Caucasian chaplains were transferred or laid off during the RIF. While no Caucasian at Broussard's facility was

affected, Broussard has established no basis upon which the

Court may or should view the events at Broussard's facility in a vacuum, disregarding the broader impact of the system-wide RIF.

'I Unlike the instant case, Hill declined the transfer and instead, [sic] wrote to the Lynch, [sic] Regional Personnel Manager requesting 'a "resident" assistant manager position in the Pine Bluff store' [Evidently, she was seeking to return to her home base and requested a transfer to suit her own personal convenience only.][4] Lynch tried to accommodate Hill by making inquiries and even recommending her (warts and all) to the Arkansas region manager"

Broussard's only articulated objection to the transfer is that it required him to commute for hundreds of miles both to and

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[4] Final bracketed material in original

from work. (See 2d Am. Compl. At 8 ¶ 25.) His aversion to the long commute presumably arises from his concern for his own personal convenience. Hill's desire to work near her home is indistinguishable from Broussard's wish to do the same. In addition, when Broussard complained about his initial transfer, the TDCJ – like Hill's employer – attempted to mitigate the inconvenience; indeed, while Hill's employer was ultimately unable to secure employment for Hill nearer to her home. Broussard was offered (and accepted) a position much closer to his original posting.

"j. Hill had not proved that the several incidents of disagreement with others ' had any significant impact on her position or authority.' The trial court's record showed that even though Hill endured racial slurs (a circumstance [] which management promptly addressed by co-worker

separation), she suffered no lack of respect or dignity, despite her conclusional [sic] claims to the contrary."

As noted above, the racial harassment endured by Hill was more severe than that alleged by Broussard – and Broussard is correct in stating that the Fifth Circuit held that even such explicitly racist did not rise to the level of a hostile work environment. Also, and as previously noted, the 'co-worker separation" in *Hill* consisted of the transfer of Hill herself.

'k. Most of the incidents of which Hill complained had occurred long before her resignation, unlike the instant case where Plaintiff recognized and documented the transfer problem to superiors promptly. Unlike Hill, he was singled out for a particularly onerous move of more than 600 miles (unlike any other person transferred because of the RIF). Further, this station was his 15th choice, the worst of all choices granted to any employee transferred because of the RIF."

Most of the incidents of which Broussard complains occurred long before his resignation, Indeed, his motion for reconsideration urges the Court to find colorable discrimination claims on the basis of hiring policies allegedly employed by the TDCJ in the late 1980s and 1990s. Hill like Broussard, complained of each alleged slight at the time that it occurred. And, in contrary to Broussard's implication, Hill filed her discrimination charges with the Equal Employment Opportunity Commission ("EEOC") within two weeks of her resignation. *Hill*, 699 F.2d at 777. Broussard himself waited a month after the announcement of the RIF to file his own charge. (*See* Pl's Resp. to Defs.' Mot. For Summ. J at 11 (stating that the RIF was implemented in June 2003) ; Memorandum and Order dated May 2003).) Finally Broussard ignores the fact that the RIF inevitably impacted some employees more severely than others, because some job locations are simply more desirable than others. Some TDCJ employees was bound to be assigned a selection lower

on his list than did anyone else. That fact alone is, of course, insufficient to demonstrate deliberate discrimination.

"l. Unlike the instant Plaintiff, Hill's true reason for objecting to her move was the convenience of her family. She was at home with the idea of being rotated or transferred it was the routine and custom of her employer to rotate the managerial staff – and she had not complained of her prior move to Shreveport, because it was not as inconvenient a move for her."

"m. Hill had not availed herself of the employer's internal grievance procedures, such as Plaintiff did. Even [ ] so, the instant Court found that Plaintiff had never made a claim of racial discrimination prior to filing his EEOC charge. Plaintiff, a lay person, had every right to believe that when he filed his grievances with the EEO office of his employer he was alerting Defendants of [sic] discrimination. Yet, unlike the Defendants in *Hill* they did nothing except pay lip service and make promises."

Plaintiff does not claim to have filed any EEOC charges prior to the one that gave rise to this suit. His previous internal complaints are not equivalent to EEOC charges and do not exhaust the requirement that such a charge be filed and a right-to-sue letter issued before a Title VII claim may be stated in court, Plaintiff has, of course, a right to believe whatever he likes – but he (and his counsel) have a duty to apprise themselves of the applicable law before asserting, in signed pleadings and motions, claims to which Broussard is not entitled.

"n. Most importantly, the difference between these two cases is that, even with scant facts to support her position (in light of her strained interactions with multiple employees)[,] Hill was afforded her day in court, and given an opportunity to develop her evidence. The instant case is far better."

The instant case is factually indistinguishable from *Hill*, except insofar as Hill received more obviously racist treatment. The Court is not obliged to try the same case over and over again once the Fifth Circuit has held that an identically situated plaintiff does not have a compensation claim. That is the meaning and the value of precedent.

In sum, the asserted differences between *Hill* and this case

are at best illusory. Notwithstanding their insufficiency, the Court has taken the trouble to address each separately and, therefore, trusts that Broussard will not seek to revisit these issues again in this forum.

II. PAST HIRING PRACTICES

Broussard also argues that the TDCJ's alleged[5] pre-1979 hiring practices were racially discriminatory and resulted in the 2003 RIF's impacting Caucasians and African Americans differently. He does not explain how Title VII entitles him to assert claims in 2004 based upon events occurring, at the latest, in 1997, nor how he can evade the 180-day time limit for filing an EEOC charge arising from those events. Broussard's counsel, who has been practicing law for more than twenty years,[6] is obviously aware of the same limitations imposed by Title VII, and the Court cautions Ms. Mutope-

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[5] Broussard's Complaint does not actually contain any factual allegations concerning the TDCJ hiring policies. (See 2d. Am Compl. At 1-14.) In the interest of a complete analysis, however, the Court addressed the contentions regarding those polices in it's May 30 Order and address them once again and for the last time today.

[6] See The Law Offices of Ayesha G. Mutope-Johnson, http://www.amutope.com

Johnson hat arguments such as this one can and do result in sanctions.

Finally, Broussard urges the Court to evaluate the racial impact of the RIF not upon all chaplains subject to it, but, rather, only those chaplains who were eligible for transfers under the RIF. Broussard has provided the Court with no reasoning or evidence to support the arbitrary exclusion of the employees who suffered the worst consequences of the RIF – those who lost their jobs entirely. Accordingly, the Court declines to adopt Broussard's selective and self-serving categorization.

III. CONCLUSION

Broussard has failed to demonstrate that either the reasoning or the conclusions contained in the Courts May 30, 2006 order were in error, and his motion for reconsideration is therefore **DENIED.**

IT IS SO ORDERED

SIGNED at Houston, Texas on this 26th day of June,2006.

/s/_____
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT COURT OF TEXAS
HOUSTON, DIVISION

FRED D. BROUSSARD,	§
	§
Plaintiff,	§
	§
VS.	§
	§**CIVIL ACTION NO.**
TEXAS DEPARTMENT OF	§**H-04-1059**
CRIMINAL JUSTICE, et al.,	§
	§
Defendants,	§

MEMORANDUM AND ORDER

The trial date in this action is set for April 24, 2006. The parties are hereby **NOTIFIED** that all dispositive motions must be filed on or before March 24, 2006
IT IS SO ORDERED

SIGNED at Houston, Texas, on this 28th day of February,2006

__/s/_____
KEITH P. ELLISON

UNITED STATES DISTRICT JUDGE